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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

PETER G. BERGMANN
Counsel of Record
KATHY H. CHIN
JARED L. FACHER
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* Home Care Council of New York, Inc. in support of the Petition for a Writ of Certiorari filed by Petitioners Long Island Care at Home, Ltd. and Maryann Osborne. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, its counsel, and the affiliate of one of its

The Home Care Council of New York City, Inc. ("HCC") is the largest professional home care organization of any metropolitan city in the nation. Founded in 1983, HCC is a not-for-profit professional association of home health care providers, and currently includes among its members 64 proprietary and not-for-profit, community-based service providers operating in the five boroughs of New York City. Together, HCC members provide over $1 billion in home care services on an annual basis to more than 70,000 elderly, disabled and frail New York City residents.

Through contracts with the City of New York's Human Resources Administration, 51 of HCC's not-for-profit members provide personal care services to Medicaid-eligible New York City residents. HCC member agencies employ over 75,000 personal care aides, commonly referred to as home attendants. These workers, who are specially certified under New York State law, may not perform the medically-related activities that a home health aide is trained to perform, but provide often invaluable assistance with patients' activities of daily living and personal care, assistance that can mean the difference between living independently at home and moving into a nursing home for an elderly New Yorker.

HCC provides advocacy and educational opportunities for its members. Previously, HCC submitted an *amicus* brief to this Court in support of the Petition for a Writ of Certiorari to review the United States Court of Appeals for the Second Circuit's July 22, 2004 decision herein. In that decision, the Second Circuit declined to enforce the longstanding regulation that exempts home health care workers employed by third-party employers from federal wage and overtime pay requirements. On January 23, 2006, this Court granted the requested Writ of Certiorari, vacated the Court of Appeals'

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members, Visiting Nurse Service of New York, made a monetary contribution to the preparation or submission of this brief.

judgment, and remanded the case back to the Court of Appeals for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 ("DOL Memorandum") (December 1, 2005). 126 S. Ct. 1189, *on remand*, 462 F.3d 48 (2d Cir. 2006). In its memorandum, the agency reiterated its long-held position that the companionship exemption pursuant to 29 C.F.R. § 552.109(a) "applies to companions employed by third party employers." Cert. Pet. App. at 51a. Despite this guidance, the Second Circuit on remand adhered to its earlier decision.

HCC respectfully submits this brief in order to again present to the Court the unique perspective of its members—home health care providers to a Medicaid-eligible patient base operating under contract with a governmental agency. Resolution of the validity of the regulation is even more critical today than it was previously, as the grant of certiorari followed by the Second Circuit's endorsement of its earlier decision has tended to increase confusion among providers and encourage the filing of collective and class actions for back wages that will turn on the validity or invalidity of the regulation. The continued enforceability of the third-party employer regulation is of critical importance to HCC's members and to their ability to continue providing services to a patient population that is largely elderly, indigent, and totally dependent on these services.

SUMMARY OF ARGUMENT

By striking down a regulation that had been in effect for 30 years, the Second Circuit improperly substituted its judgment for that of the agency charged with implementing and administering the regulation. The Court of Appeals' failure to accord the proper level of deference to the administrative agency resulted in a ruling that is already having a profound effect on the provision of home health care services in New York City and, if not reversed, will negatively affect the

provision of essential services to the elderly, disrupt the continuum of care, and impair the collective bargaining agreements of New York City home health agencies with their labor unions, all without improving the financial circumstances of home health workers. Additionally, since the Court of Appeals' original July 22, 2004 decision, numerous lawsuits have been filed that will turn upon the continued validity of the regulation. This Court should again grant *certiorari* so that a definitive resolution of these issues can be achieved.

ARGUMENT

I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES

A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy

In its memorandum and order granting the motion of Petitioners for judgment on the pleadings, the United States District Court reached the following conclusion with respect to the deference owed by the courts to the United States Department of Labor ("DOL"):

> The DOL's interpretation of Section 213(a)(15) [of the Fair Labor Standards Act ("FLSA")] in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments [in 2002] shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since [1974], Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which

> is reasonable in light of the DOL's explicit Congressional mandate.

Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003), *aff'd in part, vacated in part*, 376 F.3d 118 (2d Cir. 2004), *vacated*, 126 S. Ct. 1189, *on remand*, 462 F.3d 48 (2d Cir.), *petition for cert. filed* (U.S. Oct. 26, 2006) (No. 06-593). As the District Court thus pointed out, DOL has on at least two occasions subjected the regulation at issue to intense scrutiny, once upon its promulgation and again more recently, when consideration was given to its possible amendment. Under the circumstances, deference to the agency's considered judgment would seem appropriate not only as a matter of sound application of administrative law principles, but also as a matter of public policy.

Amicus respectfully submits that in reversing the District Court's decision with respect to 29 C.F.R. § 552.109(a), and then adhering to that decision on remand after consideration of the DOL Memorandum, the Second Circuit improperly substituted its judgment for that of the administrative agency. Even while noting in its July 22, 2004 decision that an agency action that is "'"the fruit[] of notice-and-comment rulemaking or formal adjudication"'" should generally be accorded *Chevron* deference, and even while acknowledging that Section 552.109(a) was promulgated following notice and comment, the Court of Appeals declined to accord such deference, deeming the notice and comment procedure "substandard." 376 F.3d at 130-31 (citation omitted).

The fact remains, however, that it is just such notice and comment that provides an agency with the kind of information that must enter into the rulemaking process. As the District Court pointed out, when DOL withdrew the proposed amendments to Section 552.109(a) in April 2002, it did so because "'numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into

question the Department's conclusion that there would be little economic impact.'" 267 F. Supp. 2d at 338 (*quoting* 67 Fed. Reg. 16,668 (Apr. 8, 2002)). DOL terminated the proposal, thereby choosing to leave the regulation in the form first adopted in 1974 and abandoning the amendments, which had been proposed in the Federal Register on January 19, 2001. *See* 66 Fed. Reg. 5481 (Jan. 19, 2001). DOL made this determination in the exercise of its expertise and on the basis of the "rulemaking record as a whole." 67 Fed. Reg. 16,668. For the Second Circuit to strike this regulation down in a case that has not yet proceeded beyond the pleading stage not only flies in the face of established precedent, but also illustrates why judicial deference to agency expertise is appropriate.

Agencies have an expertise in their fields that judges and legislators do not necessarily possess, and are generally in the best position to determine how a proposed rule will affect the industry and the public. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In *Chevron*, the respondents argued that the agency's interpretation was not entitled to deference because its latest interpretation represented a sharp break from its prior interpretations. This Court disagreed, noting that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. DOL has done precisely that in the circumstances of this case. Nevertheless, its views have been rejected by the Second Circuit. Even in *Skidmore v. Swift*, 323 U.S. 134 (1944), where this Court declined to defer to the agency's interpretations, this Court recognized that an administrator's policies are based on expertise in the field. *Id.* at 139 ("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"). In this particular instance, the Second Circuit could not know what the DOL learned

from the notice-and-comment proceedings, that is, the enormous impact that the invalidation of Section 552.109(a) would have on the home health care industry.

By its memorandum, which this Court specifically asked the Second Circuit to consider, the DOL provided ample response to the concerns raised by the Second Circuit, including the question whether the agency promulgated the regulation in the exercise of its delegated authority. The Department explained that it "promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its authority to issue regulations to implement all of the 1974 FLSA amendments." Cert. Pet. App. at 51a. The Department stated unequivocally that it "considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding." Cert. Pet. App. at 63a. As such, these regulations were not intended to be mere "advisory interpretations" as the Second Circuit suggested they were. Cert. Pet. App. at 63a. Rather, these regulations were intended to, and did, have the force of law for more than 30 years. Home health workers, their union representatives, and home health providers all assumed that the regulations were the law, and governed their affairs accordingly.

Nevertheless, contrary to the DOL's explicit assertion, the Court of Appeals most recently held that "§ 552.109(a) was not intended at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Cert. Pet. App. at 3a. The Court of Appeals concluded that it found "no reason to abandon the reasoning or the results reached in" its prior decision holding Section 552.109(a) to be unenforceable. Cert. Pet. App. at 6a. By adhering to its original decision, the Second Circuit continued to improperly substitute its own judgment for that of the administrative agency charged with implementing and administering the regulation in question. The impact of that decision is far-reaching, with

consequences that the Court of Appeals could not have anticipated.

B. The Second Circuit Decision Will Have A Severe Negative Impact On Home Health Care Services If Not Reversed

As the District Court herein pointed out in its analysis of Congressional intent:

> In regards to Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

267 F. Supp. 2d at 340. This reasoning holds especially true for the patients served by the members of HCC in New York City: where companionship services are being paid for from already stretched Medicaid budgets, continued exemption from the minimum wage and overtime provisions of the FLSA is essential, and clearly in accord with the Congressional intent to enable those who need home care services to obtain it.

Over the past decade, New York has cut Medicaid home care funding by an estimated $1 billion. Already the State and local administrators of the Medicaid program have had to cut back on home care services, often reducing the hours of service that the Medicaid program will cover. After the initial Second Circuit decision was issued in July 2004, the effort to reduce possible overtime liability led to further efforts to reduce service hours, and unless the Second Circuit decision is reversed, the outlook for continued service to the Medicaid-eligible patients cared for by HCC member agen-

cies is bleak indeed. The City has most recently estimated that the Second Circuit's decision will increase the cost of its personal care program by over $279 million annually. *See* Brief of Amici Curiae City of New York and New York State Association of Counties in Support of Petition for a Writ of Certiorari, dated December 5, 2006, at 6.

If the City cannot obtain the additional Medicaid funding needed to pay the provider agencies that comprise HCC's membership, they will face at best cash flow difficulties, and at worst, insolvency. Many HCC members are small community-based not-for-profit organizations that operate virtually at cost; such entities will not be able to survive while State and local governments seek additional funding for their programs. The providers can seek to minimize the impact of the Second Circuit decision by reducing overtime hours, but such efforts cannot cure the financial impact of the decision and could lead to other unfortunate effects.

While efforts can be made to cap hours to reduce overtime costs, reduction of covered hours can be devastating for patients and their families. More than half of Medicaid home care recipients in New York City have some degree of cognitive impairment, and thirty percent have moderate to severe cognitive impairment. Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* 12 (United Hosp. Fund of N.Y. May 1998). Changing from a single familiar attendant on duty for twelve hours to multiple short shifts of attendants is a disruption of routine that can be disturbing for such patients. The reduction of covered hours is a cause of distress for home health care workers as well. Home health care workers generally prefer longer-hour cases. A twelve-hour shift enables the worker to develop the kind of relationship with a patient that best serves the needs and privacy concerns of the patient, and relieves the worker from shuttling across the city from patient to patient to make up a full day's work. Shorter shifts

also pose problems in other ways, as servicing a single patient with multiple workers may require an increased number of supervisory visits from registered nurses. With a recognized acute shortage of nurses, an increased need for nurses in one sector of the health care system affects availability in other sectors as well.

If home health care services must be reduced in the City, the effect will be far-reaching. Hospitals seeking to comply with pressure to discharge patients earlier will find that there is no home health care service to discharge the patient to; patients without family to fill the gap will find themselves in nursing homes where the cost to the Medicaid system is typically greater than the cost to maintain the same patient at home. Arguably, this last unintended effect of the *Coke* decision is inconsistent with New York's efforts to comply with this Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

If the companionship exemption is no longer available to third-party agencies, then the only employers who will be able to hire home health workers without being subject to FLSA requirements will be the patient and the family of the patient. Arranging for home health care for a patient involves: (1) finding a qualified home attendant, which includes checking qualifications and screening out applicants with criminal backgrounds; (2) hiring that person, which includes negotiating wages, arranging for workers' compensation and withholding of taxes; and (3) establishing schedules and coverage for situations when the chosen worker does not arrive as scheduled. These steps, in conjunction with the complexities of adherence to the requirements of government-funded programs, are burdens that most patients and their families simply cannot be expected to assume. Agencies such as HCC's members perform a vital function in the provision of home health care in New York City; without their expertise, the system would founder.

In short, unless the Second Circuit decision herein is reversed and the exemption restored, the sudden increase in costs to the home health system will pose grave difficulties to Medicaid-funded home health care and ultimately to other Medicaid-funded services as well. Longer stays in hospitals and increased admissions to nursing homes for Medicaid-eligible patients mean a funneling of patients to more expensive forms of care. Moreover, patients will suffer loss of their independence and the lot of home health workers will not be appreciably improved. Without money budgeted for overtime, employers will have to reduce shifts to avoid overtime. Collective bargaining agreements developed with the principal labor union based in New York State that represents home care workers, Local 1199, will have to be renegotiated, as these agreements do not assume applicability of FLSA requirements. Benefits previously granted in such agreements may have to be reconsidered.

C. The Importance Of These Issues Is Underscored By The Significant Number Of Pending Cases Involving The Regulation

The importance of the issues involved in this case is underscored by the significant number of cases pending before courts around the country that turn on the validity of the third-party employer regulations. Following the Second Circuit Court of Appeals decision of July 22, 2004, which refused to enforce 29 C.F.R. § 552.109(a), numerous new cases have been filed in district courts, in the form of class and collective actions, seeking to recover overtime pay for a variety of home health workers. More than twenty such cases have been brought in the Southern and Eastern Districts of New York alone.[2] In addition, the validity of the third-party

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[2] Counsel are aware of the following pending matters: *Vaicaitiene v. Partners in Care, Inc.*, No. 04-9125 (S.D.N.Y. filed Nov. 18, 2004); *Odinokova v. Association For Servs. For the Aged*, No. 05-02576

employer regulation was recently the subject of oral argument before the Eleventh Circuit.[3] Under the circumstances, the intervention of the Supreme Court is critical. *See Laing v. United States*, 423 U.S. 161, 167 (1976) (*certiorari* granted where 70 cases pending in the federal courts depended on resolution); *United States v. Powell*, 330 U.S. 238, 240 (1947) ("The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims against

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(S.D.N.Y. filed Mar. 4, 2005); *Batchoo v. Self-Help Cmty. Servs. Inc.*, No. 05-02645 (S.D.N.Y. filed Mar. 8, 2005); *Henry v. Alliance for Health Inc.*, No. 05-01264 (E.D.N.Y. filed Mar. 9, 2005); *Flores v. Bhrags Home Care Corp.*, No. 05-04621 (E.D.N.Y. filed Sept. 29, 2005); *Rempel v. Home Attendant Serv. of Hyde Park, Inc.*, No. 05-05561 (E.D.N.Y. filed Nov. 30, 2005); *Herrera v. Council for Hum. Servs. Home Care Servs. Corp.*, No. 05-10734 (S.D.N.Y. filed Dec. 22, 2005); *Sierra v. Special Touch Home Care Servs., Inc.*, No. 06-00333 (E.D.N.Y. filed Jan. 26, 2006); *Hatcher v. Concerned Home Mgrs. for the Elderly, Inc.*, No. 06-00705 (S.D.N.Y. filed Jan. 31, 2006); *Hamilton v. Unlimited Care, Inc.*, No. 06-00706 (S.D.N.Y. filed Jan. 31, 2006); *Greggs v. Utopia Home Care, Inc.*, No. 06-00469 (E.D.N.Y. filed Feb. 2, 2006); *Lyles v. Bestacare, Inc.*, No. 06-00583 (E.D.N.Y. filed Feb. 9, 2006); *Vente v. Tender Care Prof'l Servs., Inc.*, No. 06-00682 (E.D.N.Y. filed Feb. 16, 2006); *Toussaint v. Quality Health Care, Inc.*, No. 06-00886 (E.D.N.Y. filed Mar. 1, 2006); *Seymour v. Carelink*, Inc., No. 06-1293 (E.D.N.Y. filed Mar. 22, 2006); *Grandison v. Family Care Servs., Inc.*, No. 06-02795 (S.D.N.Y filed Apr. 11, 2006); *Grandison v. North Gen. Home Attendant Corp.*, No. 06-02971 (S.D.N.Y. filed Apr. 18, 2006); *Liverpool-Turner v. En-Care, Inc.*, No. 06-03002 (S.D.N.Y. filed April 19, 2006); *Lucas v. School Settlement Home Attendant Servs., Inc.*, No. 06-02410 (E.D.N.Y. filed May 18, 2006); *Jenkins v. Hanac Home Servs., Inc.*, No. 06-03592 (E.D.N.Y. filed July 21, 2006); *Pierce v. Progressive Home Health Servs. Inc.*, No. 06-13113 (S.D.N.Y. filed Nov. 13, 2006); *Harris v. Gentiva Health Servs., Inc.*, No. 06-06331 (E.D.N.Y. filed Nov. 28, 2006). Additional cases may have been brought in the Northern District of New York as well, including *Landerway v. Home Health Care & Companion Agency, Inc.*, No. 06-01451 (N.D.N.Y. filed Dec. 4, 2006).

[3] *Buckner v. Florida Habilitation Network, Inc.*, No. 06-11032-EE (argued Nov. 6, 2006).

the Government"); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302 n.2 (1947) ("[W]e granted certiorari because of the novelty and importance of the principal question." The Court noted that the suit was "representative of a number already commenced"). These pending cases have affected scores of home health agencies and have the potential to impact hundreds, if not thousands, of home health employees, as agencies that relied upon a 30-year old regulation defend themselves against claims based on the regulation's invalidity. *See Paterson v. Lamb*, 329 U.S. 539, 541 (1947) ("This holding not only decided important questions concerning the power of the War Department, but also upset twenty-five years of important War Department rulings and practices which have affected, and will hereafter affect, the status and claims of thousands of draftees of the First World War. This called for our review, and we granted certiorari").

Because of the limited nature of the record before the Second Circuit when it rendered its decision reversing dismissal on the pleadings, and because it does not possess the expertise of the responsible agency, the Court of Appeals could not be aware of the far-reaching impact of its invalidation of 29 C.F.R. § 552.109(a). Under the circumstances, deference to the Department of Labor would have been the appropriate course. *Amicus curiae* Home Care Council of New York City respectfully requests that this Court grant *certiorari* to emphasize the dangers inherent in striking down a long-established regulation and to resolve the question of the enforceability of 29 C.F.R. § 552.109(a).

CONCLUSION

For all of the foregoing reasons, and those stated in the Petition, we respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Dated: New York, New York
December 15, 2006

Respectfully submitted,

PETER G. BERGMANN
Counsel of Record
KATHY H. CHIN
JARED L. FACHER
CADWALADER, WICKERSHAM
& TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Attorneys for Amicus Curiae